94-9069

United States Court of Appeals
FOR THE SECOND CIRCUIT

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVE ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Plaintiffs-Appellants,

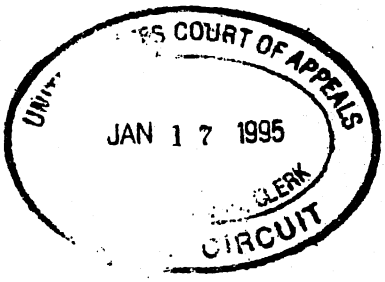
v.

RADOVAN KARADZIC,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS



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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Plaintiffs-Appellants certifies that the following persons and entities have an interest in the outcome of this case:

Internacionalna Iniciative Zena Bosne I Hercegovine "Biser," Plaintiffs-Appellants

S. Kadic, son Ognjen, son Benjamin (deceased), Plaintiffs-Appellants

Zene Bosne I Hercegovine, Plaintiffs-Appellants

Radovan Karadzic, Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page(s)

Page(s)

Page(s)

Page(s)

STATUTES

Page(s)

PRELIMINARY STATEMENT

Plaintiffs-Appellants are victims of a campaign of genocide, torture and other violations of international law perpetrated by the Defendant-Appellee Radovan Karadzic through his war of "ethnic cleansing" directed at plaintiffs as Muslim and Croatian women and children citizens of Bosnia-Herzegovina. Plaintiffs sued Karadzic in the United States District Court for the Southern District of New York, alleging claims under the Alien Tort Claims Act and the Torture Victim Protection Act—both of which provide causes of action by aliens against other aliens for exactly the kinds of acts that Karadzic perpetrated upon plaintiffs.

This is an appeal from a decision by Judge Peter K. Leisure (866 F. Supp. 734 (S.D.N.Y. 1994)) on a motion to dismiss in which the parties briefed the issue of *personal jurisdiction* over the defendant, but in which the court, *sua sponte*, and without providing the parties an opportunity to be heard, addressed and decided issues of purported *subject matter* jurisdiction and dismissed plaintiffs' complaint. Further, without benefit of briefing, the court erroneously perceived that its jurisdiction over the subject matter of the case turned on the merits of plaintiffs' substantive claims. While one of the statutes relied on by plaintiffs, the Alien Tort Claims Act, is *also* a basis for federal jurisdiction, the court ignored the fact that plaintiffs alleged a substantive federal claim under the Torture Victim Protection Act for which 28 U.S.C. § 1331 provides federal jurisdiction.

The court also erred in construing the merits of plaintiffs' claims. Although it is uncontested that defendant Karadzic is the leader of an unrecognized state-in-fact, and that he further acted in concert with, and with the support

of, the recognized state of Yugoslavia, the court held that Karadzic's acts of genocide, torture and other violations of international law were purely "private" and not reached by the federal statutes and principles invoked by plaintiffs. Many of the international law violations alleged by plaintiffs, however, are actionable even against private persons. Moreover, the defendant is by no means a private actor. Accordingly, the district court's order should be reversed and the action remanded for further proceedings.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1367, as well as under the Alien Tort Claims Act, 28 U.S.C. § 1350. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The order and judgment of Judge Leisure appealed from (866 F. Supp. 734 (S.D.N.Y. Sept. 7, 1994)) disposes of all claims. Judgment was entered on September 12, 1994. Plaintiffs-Appellants filed their notice of appeal on October 18, 1994.

ISSUES PRESENTED

1. Did the district court err when it determined, *sua sponte*, that Plaintiffs-Appellants lacked subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) without providing the parties notice and an opportunity to brief the issue?

2. Did the district court err in holding Plaintiffs-Appellants' claims not to be actionable under the Alien Tort Claims Act, 28 U.S.C. § 1350, where plaintiffs have alleged torts in violation of international law, including genocide,

war crimes, torture, and extra-judicial killing, as set forth in Plaintiffs-Appellants' complaint?

3. Did the district court err in holding Plaintiffs-Appellants' claims not actionable under the Torture Victim Protection Act, 106 Stat. 73, § 2(a), *printed at* 28 U.S.C. § 1350, where plaintiffs alleged that Defendant-Appellee acted under actual or apparent authority, or under color of law, of his own military state of "Srpska" and of the recognized state of Yugoslavia, when carrying out his campaign of torture and murder?

4. Did the district court err in dismissing Plaintiffs-Appellants' action in disregard of the fact that Plaintiffs-Appellants properly obtained personal jurisdiction over Defendant-Appellee under Fed. R. Civ. P. 12(b)(2)?

STATEMENT OF THE CASE

Factual Background

Plaintiffs-Appellants S. Kadic and her son Ognjen, and women and children affiliated in and served by Zene Bosne I Hercegovine ("Zene BiH"), and Internationalna Iniciative Zena Bosne I Hercegovine "Biser" ("Biser") (collectively, "plaintiffs"), are survivors of atrocities committed during a campaign of genocide through war directed at them as Muslim and Croatian women and children citizens of Bosnia-Herzegovina. Cmplt. ¶ 3, Joint Appendix ("JA") 7. S. Kadic's son Benjamin, and many family members of those in Zene BiH and Biser, were murdered in the same genocide. Cmplt. ¶¶ 12, 17, JA 10, 12.

Defendant Karadzic ordered and directed the victimization of plaintiffs in his official capacity as President of the self-proclaimed Republika Srpska and high commander of its military forces. Cmplt. at ¶¶ 2-3, JA 6-7; *see* Statement by Radovan Karadzic, May 3, 1993 ("Def. Stmt.") ¶ 1, JA 51. Republika Srpska is an ethnically homogenous body of Bosnian Serbs within the territory of Bosnia-Herzegovina created through aggression termed "ethnic cleansing," through which nearly all persons who, like plaintiffs, are not ethnically Serbian, are liquidated, forcibly expelled, or imprisoned and tortured by military forces defendant leads. Cmplt. ¶¶ 14, 28, 29, JA 11, 15-16. This onslaught has been carried out in collaboration with, and with the significant material assistance of, another country, the Serbian regime in Belgrade, Yugoslavia. Cmplt. ¶¶ 2, 18, 27, JA 6, 12, 15. These acts are continuing. Cmplt. ¶ 30, JA 16.

Plaintiffs, as Muslim or Croatian women or girls, were sexually assaulted by military forces under the command and control of defendant, under his orders and pursuant to his policies. Cmplt. ¶¶ 16-26, JA 11-15. Some were thereby forcibly impregnated. Cmplt. ¶¶ 25, 26, JA 14-15. They, and members of their families—almost all of them civilian noncombatants—were murdered, expelled from their homes, forcibly imprisoned and starved and systematically tortured, including in camps maintained at the direction and under the control of defendant, because they are not of Serbian ethnicity. Cmplt. ¶¶ 16-26, JA 11-15.

Plaintiff S. Kadic, a Croatian Muslim woman civilian citizen of Bosnia-Herzegovina, together with Muslim and Croatian women served by and comprising plaintiff groups

"Biser" and "Zene BiH," are survivors of this genocide through war. In mid-April, 1992, plaintiff Kadic was forcibly ejected from her home because of her ethnicity by Serbian military men ("chetniks"). Some of these soldiers displayed insignia of the Yugoslav People's Army (JNA). Cmplt. ¶ 18, JA 12-13. Plaintiff Kadic's son Benjamin was beheaded as she held him in her arms by a Serbian military man. Cmplt. ¶¶ 17-18, JA 12-13. She fled with Benjamin's twin, Ognjen. They were captured and imprisoned in a Serbian-run rape/death camp for 21 days. There she was starved, Cmplt. ¶ 23, JA 14, and raped every day at least ten times, each time by three or four Serbian soldiers, during which her ethnicity was verbally assaulted. Cmplt. ¶¶ 19-22, JA 13-14. She was told the raped women were to produce "chetnik" babies. Upon release, she discovered she was pregnant as a result of the rapes and had an abortion. Cmplt. ¶¶ 24-25, JA 14. She and Ognjen were horribly violated and lastingly damaged by these outrages. They live as refugees. Muslim and Croatian women and children refugees in plaintiff groups have all been victimized by ejection, imprisonment, and torture, including systematic rape, as a result of which some were made pregnant, and murder of family members, in the same genocidal war. Cmplt. ¶ 26, JA 14-15.

Due to war, occupation, and the likelihood of reprisals, it is impossible to adjudicate these torts—which violate international law, laws of the United States and the State of New York, Bosnia-Herzegovina, and present and former Yugoslavia—where they were committed. Cmplt. ¶ 31, JA 16.

Proceedings in the Court Below.

On March 4, 1993, Judge Richard Owen of the United States District Court for the Southern District of New York granted plaintiffs' *ex parte* motion for service on Defendant Radovan Karadzic of the summons and complaint in this action. The court ordered the papers be served on U.S. government agents guarding defendant, who were in turn ordered to serve Karadzic with them forthwith. Order, Civ. Action No. 93-Civ-1163 (March 4, 1993) (Owen, J.). This was done. Declaration of Special Agent Roy Anthony Diebler, September 30, 1993, at ¶ 18 ("Diebler Dec."), JA 168; Def. Stmt. ¶ 9, JA 52.

In their Complaint, plaintiffs seek injunctive relief and compensatory and punitive damages for personal injuries of genocide, breaches of the humanitarian laws of war, and torture due to acts committed at the direction and under the control of defendant in the genodical war in Bosnia-Herzegovina. Plaintiffs have been subjected to systematic rape, forced pregnancy, enforced prostitution, and extrajudicial killing, in violation of law including treaty law, customary international law, the laws of war, and the laws of the United States. The action was brought pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA") and the Torture Victim Protection Act, 106 Stat. 73, § 2(a), *printed at* 28 U.S.C. § 1350 (1992) ("TVPA") and federal and supplemental jurisdiction.

On May 10, 1993, defendant, appearing specially through counsel, moved to dismiss this and the related action, *Does I and II* v. *Karadzic*, 93 Civ. 0878 (PKL) "pursuant to Fed. R. Civ. P. 12(b)(1), (2), (4), (5) & (6) on

grounds of lack of subject matter and personal jurisdiction, insufficiency of process and service of process and nonjusticiability of plaintiffs' claims." Notice of Motion to Dismiss Action Before Answer (May 10, 1993) at 1-2, JA 38-39. Defendant argued that process and service of process violated United Nations (U.N.) invitee status, would burden U.N. peacemaking functions, and violated due process, as defendant's presence in New York was transitory or nonexistent. Memorandum in Support of Motion to Dismiss Before Answer (May 10, 1993), JA 40.

Plaintiffs argued that defendant's status conferred no protection from service of civil process, that U.N. functions were enhanced rather than jeopardized by holding violators of international law accountable for their actions, and that defendant was, in fact, in New York and served consistent with due process requirements. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Prior to Answer (August 6, 1993), JA 70. In addition, plaintiffs argued that subject matter jurisdiction based on violations of customary international law, combined with proper service of process, conferred personal jurisdiction in this case. *Id.* In reply, defendant asserted lack of personal jurisdiction based primarily on a so-called "functional immunity." Defendant's Reply Memorandum in Support of His Motion to Dismiss (October 1, 1993), JA 146. None of the parties purported to brief all the various grounds on which the district court could base subject matter jurisdiction over the claims in plaintiffs' Complaint. *See* JA 49-50.

The district court bypassed defendant's motion for dismissal based on service of process and lack of personal jurisdiction, granting instead, *sua sponte*, a motion to

dismiss for lack of subject matter jurisdiction. Opinion and Order, *Kadic* v. *Karadzic*, 93 Civ. 1163 (PKL) (slip op. September 7, 1994) ("Op."), 866 F. Supp. 734 (S.D.N.Y. 1994). The court noted preliminarily that defendant may in the future head a state, rendering this case injusticiable and an opinion in it advisory, militating against exercise of subject matter jurisdiction. Op. at 7, JA 200. The district court found defendant to be a "private individual[]" Op. at 16, JA 209, unreachable by the law of nations. The court dismissed claims for torture—which the court deemed limited to official acts of a recognized state—because "Karadzic does not act with the authority of any foreign nation." Op. at 18, JA 211. Without discussing plaintiffs' other claims, the district court then dismissed all claims for lack of subject matter jurisdiction. Op. at 24, JA 217. Plaintiffs appealed.

SUMMARY OF ARGUMENT

The Alien Tort Claims Act and 28 U.S.C. §§ 1331 and 1367 confer federal subject matter jurisdiction over this action.

The district court, *sua sponte*, without benefit of briefing, and in conflict with the pleadings and the record, dismissed this action for lack of subject matter jurisdiction, which it wrongly perceived to be controlled exclusively by the substantive statutes under which plaintiffs brought this case. In fact, plaintiffs are entitled to a federal forum because their claims arise under the laws of the United States, namely the Torture Victim Protection Act, or are supplemental to claims over which the district court has jurisdiction.

In addressing the merits of plaintiffs' claims, the district court erroneously determined defendant Karadzic to be a purely private person, unable to be sued for violations of international law. This was twice in error: first, because many of the violations complained of, such as acts of genocide and war crimes, have no official component; second, because defendant's status and official activities amply satisfy the requirements for those torture and summary execution claims that do have such a component. Defendant's status is irrelevant to plaintiffs' claims for genocide and war crimes, because neither private parties nor public officials may commit them. The ATCA has consistently been applied to egregious private acts that violate the law of nations. But the fact that defendant Karadzic is far more than a private actor is undisputed, making his "ethnic cleansing" actionable under the TVPA as well.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

The district court erred in dismissing the complaint for lack of subject matter jurisdiction for several reasons. First, subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 with regard to plaintiffs' claim under the TVPA. The district court never addressed this fact. At a minimum, plaintiffs' other claims may be heard in federal court because they are supplemental to the TVPA claim. Moreover, even if inquiry into the merits of the plaintiffs' claims were

required, the district court misconstrued the facts and law pertaining to those claims.

Questions of subject matter jurisdiction are reviewed *de novo*. *Hotel and Restaurant Emp. Union* v. *J.P. Morgan Hotel*, 996 F.2d 561, 564 (2d Cir. 1993).

A. The District Court Erred in Resolving the Issues Before it as Issues of Subject Matter Jurisdiction.

Although defendant Karadzic's Notice of Motion in the district court purported to move for dismissal pursuant to Fed. R. Civ. P. 12(b)(1), (2), (4), (5) & (6), the briefs of the parties were limited to the issue of personal jurisdiction over defendant. Subject matter jurisdiction was addressed only for its bearing on issues of personal jurisdiction. Karadzic's brief in support of his motion specifically stated that issues of subject matter jurisdiction would require "thorough briefing and consideration" that was "premature and inadvisable" in light of his confidence in his personal jurisdiction arguments. Memorandum in Support of Motion to Dismiss before Answer, at 10-11, JA 49-50. The district court nonetheless, without notice to the parties, dismissed the action for lack of subject matter jurisdiction.

There simply is no question that the district court had jurisdiction over the subject matter of this case. Plaintiffs' Complaint alleges violations of the Torture Victim Protection Act. 106 Stat. 73, *printed at* 28 U.S.C. 1350. The TVPA is not a jurisdictional statute, but provides a substantive federal claim. Federal jurisdiction is accordingly based upon 28 U.S.C. § 1331 for actions "arising under" the laws of the

United States. The proper inquiry in "testing the complaint for sufficient assertion of a federal question" is merely whether "the complaint is for a remedy expressly granted by an act of Congress." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 425-26 (2d Cir. 1965), *cert. denied*, 382 U.S. 1026 (1965). "Jurisdiction...is not defeated...by the possibility that the averments might fail to state a cause of action...." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Accordingly, the district court's analysis (which, in any event, plaintiffs submit was erroneous) regarding the merits of plaintiffs' TVPA claim was wholly irrelevant to the question of subject matter jurisdiction.

Because plaintiffs are properly in federal court on their TVPA claim, the district court has jurisdiction pursuant to 28 U.S.C. § 1367 over all the other claims in the complaint because they form part of the same case or controversy as the TVPA claim. Indeed, all the claims in the complaint arise either from precisely the same actions of defendant, or from different actions which all are part of the single program of genocide and torture engaged in by him. Accordingly, the district court's discussion (which, again, plaintiffs submit was erroneous) on the merits of plaintiffs' claims under the ATCA and implied causes of action was irrelevant to the issue of federal subject matter jurisdiction.

While it is true that the ATCA is *also* a grant of federal jurisdiction, plaintiffs do not need to rely solely upon it to obtain a federal forum. Thus, the discussion of the merits of plaintiffs' claims should have been addressed under the standards of a Fed. R. Civ. P. 12(b)(6) motion, not for lack of jurisdiction. Even if the ATCA were the sole basis for federal subject matter jurisdiction asserted, there is

authority for the proposition that the court should address the issue as one of whether the complaint states a claim. "[W]hen a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976). *Accord Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 781-784 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring), *cert. denied*, 470 U.S. 103 (1985). At this point, any question of the Complaint's legal adequacy would concern whether a claim had been stated under Rule 12(b)(6), for which subject matter jurisdiction is assumed. Under Rule 12(b)(6), facts as pleaded in the Complaint are assumed to be true—although the Court may, of course, deem them legally insufficient—or else the motion should be converted to one for summary judgment.[1/]

Moreover, if the district court believed it should address its jurisdiction over the subject matter before deciding the issues of personal jurisdiction briefed by the parties, it should have allowed plaintiffs the opportunity to

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[1/] When weighing jurisdiction under Rule 12(b)(1) in similar circumstances, this Court limited itself to facts of record. *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). In a similar position, the D.C. Circuit in *Tel-Oren* unanimously limited itself to the pleadings. *Tel-Oren*, 726 F.2d at 775 ("For purposes of our jurisdictional analysis, we assume plaintiffs' allegations to be true.").

be heard before dismissing on this basis. Although courts have latitude to determine whether subject matter jurisdiction exists, this discretion does not allow a district court to determine a Rule 12(b)(1) motion without providing the plaintiff an opportunity to demonstrate the basis for its jurisdictional claim. *Prakash* v. *American University*, 727 F.2d 1174, 1180 (D.C. Cir. 1984). If the court does not afford a plaintiff confronted with a Rule 12(b)(1) motion "an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention," *Local 336, American Fed. of Musicians* v. *Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973), a dismissal for lack of subject matter jurisdiction is incorrect. *Id.* The district court should have notified the parties of its intention to decide on subject matter jurisdiction and allowed the parties to brief the issue and submit affidavits if needed.

This Court has held that, on an appeal from a dismissal for lack of subject matter jurisdiction, this Court "accepts as true all material factual allegations in the complaint," *Atlantic Mutual Insurance Co.* v. *Balfour MacLaine Int'l. Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992). It has also held that, under Rule 12(b)(1), courts may go beyond the pleadings to affidavits, *Antares Aircraft, L.P.* v. *Fed. Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir. 1991), *vacated on other grounds*, 112 S. Ct. 3020 (1992); *See* 2A Moore's Federal Practice ¶ 12.07 [2.-1] (1994), to resolve disputed questions of fact. This does not mean a court may go beyond the *record*, rely on factual speculation, employ incompetent evidence, or invent factual disputes, such as whether or not defendant is a private actor, as the court did here.

The district court cited newspaper articles as the basis for false conclusions of fact and law, such as that events in Bosnia-Herzegovina are "a state of civil war between several ethnic factions," Op. at 3, JA 196, and to support speculation, such as that Defendant may some day be a head-of-state and thus immune from this suit, Op. at 8 n.7, JA 201. Other crucial facts, such as the level of organization of the Bosnian Serbs, Op. at 15, JA 208, were established without citing any factual basis, leaving open the possibility that newspapers were consulted. Newspaper and magazine articles are not "competent evidence." When used to demonstrate the truth of a matter asserted, they are incompetent hearsay. Fed. R. Evid. 801(c), 802; *In re Columbia Securities Litig.*, 155 F.R.D. 466, 474 (S.D.N.Y. 1994). Judicial notice may be taken of a newspaper article only if the facts in it are "beyond reasonable controversy." *Fasolino Foods Co.* v. *Banca Nazionale del Lavoro*, 761 F. Supp. 1010, 1019 (S.D.N.Y. 1990), *aff'd*, 961 F.2d 1052 (2d Cir. 1992). This is not the case here.

Plaintiffs were clearly prejudiced by the district court's application of Fed. R. Civ. P. 12(b)(1) standards to what was actually a 12(b)(6) inquiry into the merits of their claims. They were also prejudiced by the failure of the court below to provide an opportunity to address issues of subject matter jurisdiction and by that court's use of extra-record incompetent factual sources. The district court also erred as a matter of law in its analysis of plaintiffs' claims, whether considered under jurisdictional standards or for failure to state a claim. Accordingly, plaintiffs respectfully submit that this Court should not only reverse the district court's dismissal for lack of subject matter jurisdiction but should

correct the district court's erroneous analysis of plaintiffs' claims as well.

B. The District Court Erred in Dismissing Plaintiffs' Claim Under the Alien Tort Claims Act.

The district court held that it lacked subject matter jurisdiction under the Alien Tort Claims Act because, in essence, plaintiffs failed to allege a violation of the law of nations. Plaintiffs alleged that defendant, in his role as leader of an insurgent regime and in collaboration with a recognized state, "designed, ordered, implemented and directed," Cmplt. ¶ 14, JA 11, a campaign of rape, forced expulsions, imprisonment and murder through a war designed to eliminate, by extermination or ejection, the entire non-Serbian population from Bosnia-Herzegovina. According to the district court, this did not rise to the level of a violation of international law because the law of nations actionable in U.S. courts only prohibits "official torture." The district court held that defendant was no more than a "private individual[]" whose acts were not subject to international regulation. Op. at 15, JA 208.

In fact, the ATCA is limited neither to torture nor to official acts. It provides relief from certain acts of genocide and war crimes regardless of the official status of the perpetrator. It also unquestionably allows actions by victims of campaigns of torture by perpetrators with status as public as that of defendant.

1. Claims under the ATCA are limited neither to official acts nor to torture:

The plain meaning of the statutory language of the ATCA confers jurisdiction over plaintiffs' claims. It provides that "[t]he district courts *shall have original jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). This is a civil action. Plaintiffs are aliens. Their claims are tort claims. Plaintiffs could have sued Karadzic for the acts specified, including rape, in New York courts under common law transitory tort doctrine. *See Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 885 (2d Cir. 1980). *See also, on remand, Filartiga* v. *Pena-Irala*, 577 F. Supp. 860, 862-863, 866 (1984) ("tort" in ATCA refers to violation of law of nations). The acts alleged violate international law, as demonstrated below. Under these circumstances, jurisdiction is clear. *See Amerada Hess Shipping Corp.* v. *Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989); *In re Estate of Marcos, Human Rights Litigation*, 978 F.2d 493, 499, 503 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Paul* v. *Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

The language of the ATCA nowhere indicates that its scope is limited, as the district court suggests, to actions involving state officials. In the eighteenth century, one of the most commonly recognized offenses against the law of nations was piracy. 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765-1769, University of Chicago, ed. 1979). Pirates were private, as was slave-trading and certain crimes of war. Nonetheless

these offenses were prohibited by the law of nations. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992) ("Bassiouni"). The ATCA was enacted during this period when non-state actors were unquestionably legally accountable for certain offenses against the law of nations. Acknowledging that the ATCA has no explicit requirement of official action, then Judge Scalia observed that it "may conceivably have been meant to cover *only* private, nongovernmental acts that are contrary to treaty or the law of nations..." *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985). While modern courts rightly cover official acts as well, this observation reflects the ample support in ATCA precedent for the actionability of certain unofficial acts.

As the Memorandum Amicus Curiae of Law Professors ("Paust Brief") submitted in this action well documents, federal jurisprudence is replete with cases holding individual defendants who do not act on behalf of any recognized state liable for violating international law. *See*, *e.g.*, 1 Op. Att'y Gen. 57, 59 (1795) (attacks by American citizens with French fleet on British colony in Africa actionable by British subjects); *Terrill* v. *Rankin*, 65 Ky. (2 Bush) 453 (1867) (applying law of war to actions of Confederate soldiers personally); *Adra* v. *Clift*, 195 F. Supp. 857 (D. Md. 1961) (child custody action for falsification of passport). *See generally* Jordan Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 Va. J. Int'l L. 351 (1991) ("Suing Saddam"); Jordan Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 Mich. J. Int'l L. 543, 639-40 (1989) ("*On Human Rights*") (courts have always applied

international law to entities other than formally recognized states). Much international humanitarian and human rights law applies to individuals without regard to whether they acted on behalf of a public body. *See* Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights* Law, 5 Harv. Hum. Rts. J. 51 (1992) ("*Other Side*").

In *Filartiga*, this Court held that United States courts have subject matter jurisdiction over claims by aliens who have suffered a tort in violation of a "well-established, universally recognized" norm of international law. *Filartiga*, 630 F.2d at 888 ("official torture"). This ruling gave aliens no new rights but merely recognized that federal courts were open to them to adjudicate rights they already had under international law. *Id.* at 887.[2/] This holding flows directly from the history and language of the ATCA and has been repeatedly followed by courts, before and after *Filartiga*. *See*, *e.g.* Paust, *On Human Rights*, at 639-40. Contrary to the District Court below, Op. at 11, JA 204, this Court explicitly envisioned access to federal courts for alien

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[2/] Judge Edwards, concurring in *Tel-Oren*, interpreted this language as implicitly recognizing that § 1350 provides a cause of action along with jurisdiction, as plaintiffs also submit it does. 726 F.2d at 780-81. Judge Bork, concurring, expressed the contrary view, requiring that a cause of action be expressly provided in the "law of nations," *Id.* at 801, 804-05. Eliminating any function for the ATCA, this view was apparently not accepted by Judge Leisure, as it allows jurisdiction to be dismissed without examining "the merits of [the] case," *Id.*, at 805, while Judge Leisure dismissed this case only after examination of the merits.

victims of breaches of *other* customary international law when it held that "[w]hile the ultimate scope of those rights [assertable under § 1350] will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now *among them*," *Filartiga*, 630 F.2d at 885, 890 (emphasis added), and *id.*, at 890.

ATCA cases over which federal courts have exercised jurisdiction since *Filartiga* have not been confined to official torture. *See, e.g.*, *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (arbitrary detention, summary execution, causing disappearance, as well as torture); *Linder* v. *Portocarrero*, 963 F.2d 332 (11th Cir. 1992) (wrongful death by non-state actors). The District Court was mistaken in believing that crimes including slave trade, piracy, and wrongful death must be "committed under the color of state law" to be actionable under the ATCA. Op. at 10 n.8, JA 203. This Court has recognized specifically that "[t]he evolving standards of international law govern who is within the [ATCA's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. "There appears to be a growing consensus that § 1350 provides a cause of action for certain 'international common law torts.'" *Forti*, 672 F. Supp. at 1539.

The district court's position that international law is confined to states ignores both the history of the law of nations and the development, particularly since the Nuremberg trials, of firmly established principles of individual culpability for certain egregious violations. Philosopher Jeremy Bentham urged in 1789 that international law be confined to states, both as actors and as victims. An Introduction to the Principles of Morals and Legislation 296 (J. Burns & H.L.A. Hart eds., 1970). Statism was never

widely endorsed or favored by U.S. courts. Paust, *On Human Rights*, at 647-49 and n.600-602. The understanding of the district court below seems frozen in this nineteenth century positivism, as cautioned against by Judge Kaufman in *Filartiga*, 630 F.2d at 881, an opinion the district court purported to follow. The strengthening of individual rights in international law following World War II, including the law against genocide invoked here as well as more recent initiatives on behalf of women's human rights, *see* Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U.J. Int'l L. & Pol. 857 (1992), are consistent with early understandings and contemporary needs in affirming international rights and obligations in actors other than states.

Instead of applying this law, the district court stated that, since *Filartiga*, "the decisions reviewed by this court reinforce the conclusion that acts committed by non-state actors do not violate the law of nations." Op. at 11-12, JA 204-05. As authority, the court cited the D.C. Circuit's ruling in *Tel-Oren*, Op., at 10, JA 203, a case that is entirely distinguishable from the instant case. The *Tel-Oren* plaintiffs sought relief for unofficial acts of terrorism in peacetime. Prohibitions on terrorism lack the recognition as customary law and *jus cogens* of the violations at bar, infra. at § IB2(c); further, because they were committed during peacetime, the *Tel-Oren* acts do not violate the humanitarian law invoked here. But to the extent the opinions in Tel-Oren argue the global proposition that international law as such never provides ATCA access against non-state actors, they are completely at odds with longstanding historical precedent. In denying subject matter jurisdiction on this broader ground, Judge Bork stood alone in his opinion, 726

F.2d at 798, Judge Robb not reaching the issue, *id.* at 803 n.8, and Judge Edwards limiting himself more closely to the law at issue, rejecting Judge Bork's approach in significant respects, and embracing this Court's *Filartiga* interpretation. *Tel-Oren*, 726 F.2d at 775, 779. Until adopted by Judge Leisure, this position had never been fully embraced by any court, including the D.C. Circuit, and has been decisively rejected by Congress and legal scholars. *See*, *e.g.*, Paust, *On Human Rights*, at 646-50.

The remaining authority cited by the court below is similarly inapposite. The district court decision in *Linder*, for example was reversed by the Eleventh Circuit on precisely this point, holding that the Contras could not be sued as a party but individuals could be. *Linder*, 963 F.2d at 332. Similarly, the District Court materially misquoted the Fifth Circuit's decision in *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1989). Op. at 14, JA 207, where the Fifth Circuit assumed that "the Alien Tort Statute *does* confer subject matter jurisdiction over...private parties..." *Carmichael*, 835 F.2d at 113-114 (emphasis added). Finally, *Forti* Op. at 15, is pure dictum on this point and entirely inapplicable to Plaintiffs' claims for genocide, war crimes, and crimes against humanity. 672 F. Supp. at 1541. Under applicable authorities, the atrocities perpetrated by defendant are unquestionably actionable under ATCA.

2. Plaintiffs' claims for genocide, war crimes, and torture are actionable under the ATCA.

Plaintiffs' claims that Karadzic violated principles of customary and treaty-based international law—claims the

District Court ignored—are entirely sufficient to satisfy the requirements of the ATCA. The ATCA expressly provides for original jurisdiction in federal courts over torts committed in violation of international treaties. "*All* treaties...shall be the supreme Law of the Land...," Art. VI, § 2 U.S. Constitution, "even without any congressional initiative." Laurence Tribe, *American Constitutional Law* 226 (1988). Inexplicably, the district court asserted that "Plaintiffs do not contend that their claim arises under a treaty of the United States." Op. at 9, JA 202. Plaintiffs stated claims under many treaties to which the United States, Bosnia-Herzegovina, and all successors to Yugoslavia are parties, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Prior to Answer ("Plaintiffs' Memo") at 12 n.14, 15, JA 70; Jordan Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 Am. U. J. Int'l L. & Pol'y 499 (1994) ("Applicability"), notably the Convention on the Prevention and Punishment of Genocide *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (the "Genocide Convention"), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, at 2, and the Geneva Conventions of 1949 (war crimes and humanitarian laws), especially Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Civilian Convention"). Since non-state actors can be subject to criminal liability

under these laws, they are also subject to civil suits brought in U.S. courts by alien plaintiffs under the ATCA.[3/]

[3/] There is some authority that ratified treaties may only be relied upon by private litigants when "self executing," or when Congress has passed implementing legislation. *U.S.* v. *Postal*, 589 F.2d 862 (5th Cir. 1979). The Torture Victim Protection Act partly implements the Torture Convention; the Genocide Convention is implemented by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091. The Civilian Convention may be self-executing by its own terms. *See* Paust, *Suing Saddam*, 366-68. Moreover, the U.S. government may have adopted the Geneva Conventions on the assumption that they were self-executing, seeing no need to enact further legislation to provide effective penal sanctions for grave breaches. Hearing Before the Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims, U.S. Senate, 84th Cong., 1st Sess. 58 (1955). In terms that could be applied to the Civilian Convention, one court has recently forcefully argued that the Geneva Convention No. III Relative to the Treatment of Prisoners of War (the "POW Convention") is self-executing. *U.S.* v. *Noriega*, 808 F. Supp. 791, 797 (S.D.Fla. 1992) (fact that one provision calls for domestic legislation to provide penal sanctions for grave breaches does not render other parts non-self-executing). "It is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by an individual POW in a court of law." *Id.* at 799. Both the POW Convention and the Civilian Convention, by their terms protect

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As part of the "law of nations" referred to in the ATCA,[3] customary international law and *jus cogens* are directly incorporated into U.S. law, without need for implementing legislation. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Filartiga*, 630 F.2d at 886; *Tel-Oren*, 726

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[3](...continued)
individuals. *See* Paust, *Suing Saddam*, at 367, n. 79-80. But cf. *Tel-Oren*, 726 F.2d at 809. Moreover, the ATCA arguably *executes* treaties for purposes of federal subject matter jurisdiction with respect to alien plaintiffs. Paust, *On Human Rights*, at 640 and n. 569; Paust, *Suing Saddam*, at 369. But cf. *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring). In any event, these treaties remain evidence of customary international law and thus support plaintiffs' argument for the federal jurisdiction. Worries that the Torture Convention may not be self-executing did not stop the Filartiga court, or courts since, from providing a right of action to alien victims of official torture under the ATCA. Relevant portions of those treaties in the Complaint that the U.S. has not ratified remain part of customary international law and thus may be invoked under the ATCA. *See, e.g.*, John Embry Parkerson, Jr., *United States Compliance with Humanitarian Laws Respecting Civilians During Operation Just Cause, 133 Mil. L. Rev. 31, 65 (1991)* (stating that U.S. has agreed that Protocol II to the 1949 Geneva Conventions represents customary international law); *Customary Law and Additional Protocols to The Geneva Conventions for Protection of War Victims*, 81 Am. Soc'y Int'l L. Proc. 26, 33 (1987) (numerous provisions of Protocol I, including prohibition against attacks on civilian populations, are customary international law).

F. 2d at 810 (Bork, J., concurring); Paust Brief § II. The Genocide Convention and the laws of war as embodied in the Geneva Conventions—plaintiffs' claims that the District Court ignored—are widely viewed as embodying principles of customary international law, and are applicable to individual perpetrators. Having wrongly found defendant to be a private person, see § I C *infra*, the District Court then wrongly ignored laws cited by plaintiffs that govern even unofficial actors during armed conflicts and genocidal atrocities committed by anyone, whether in peace or war.[4/]

[4/] The International Covenant on Civil and Political Rights, G.A. res. 220GA (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717, entered into force Mar. 23, 1976 (the "ICCPR"), perhaps the most important human rights convention applicable outside the context of armed conflict, is commonly regarded as reflecting customary international law. *See Fernandez* v. *Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981); *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887 903 n. 29 (N.D. Ga. 1985). The ICCPR does not use terminology like "official;" indeed the majority of its provisions are not so directed. Preamble; Art. 5 ¶ 1, Arts. 6-12, 17-25; Paust, "Other Side," at 61. Karadzic cannot be heard to argue that the Covenant, and the rights and obligations it embodies, are applicable only to recognized states. In addition, his activities violate the human rights provisions of the U.N. Charter, as elaborated by the Universal Declaration of Human Rights, each of which are evidence of customary international law. *Filartiga*, 630 F.2d at 882.

a. Plaintiffs' claims for torts of genocide should not have been dismissed.

The prohibition against genocide is one of the most universal and fundamental known in law. 1 Restatement (Third) of the Foreign Relations Law of the United States § 404, ("Restatement") (1986) 1; *Siderman* v. *Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (rights against genocide universal and fundamental); *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 942 (D.C. Cir. 1988) ("universal disapprobation" aroused by genocide); *Tel-Oren*, 726 F.2d at 781, 791 n.20 (genocide as "heinous" and "violates definable, universal and obligatory norms") (Edwards, J., concurring).

Even more than torture, genocide unquestionably violates customary international law as a well-recognized example of a peremptory norm *jus cogens*. *Siderman*, 965 F.2d at 715; *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173-4 (D.C. Cir. 1994) (genocide violates *jus cogens*), from which "no derogation is permitted." *Committee of U.S. Citizens*, 859 F.2d at 940 quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679. Genocide is one of those "shockingly egregious violations of universally recognized international law," *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983), which this Court has recognized is actionable under § 1350. Defendant Karadzic allegedly directed, authorized, or condoned acts that number among the clearest violations of norms *jus cogens*. *See* 2 Restatement § 702 and cmt. n.

The Nuremberg Tribunal decisively rejected the view that only states, not individuals, were accountable under international law. 1 Trial of the Major War Criminals Before the International Military Tribunal 223 (Nuremberg 1947). "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946). The Nuremberg Charter is the constitutional equivalent of a treaty. Plaintiffs' Brief at 12 n.14, JA 83. State action was not a requisite element of the offenses charged at Nuremberg and the other World War II tribunals. Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, 28-29 (1992).

The Genocide Convention unambiguously imposes the obligation to refrain from genocidal acts upon individual, non-state actors. Article IV provides that "[p]ersons committing genocide...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." The Convention embodies the international consensus that the official status *vel non* of the perpetrator does not affect exposure to individual liability for acts committed that meet the legal definition of genocide.[5/] In

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[5/] Forty years after the Convention was drafted, Congress passed implementing legislation that limited, for purposes of criminal sanctions, the definition of genocide to offenses committed within the U.S. or by U.S. nationals. 18 U.S.C. § 1091. This was done although treaties are incorporated directly into U.S. law without the need for implementing

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debates over drafting the Genocide Convention, excluding private actors was explicitly discussed and rejected. Lawrence J. LeBlanc, *The United States and the Genocide Convention*, 29-31 (1991). In ratification discussions, Congress discussed and rejected attempted modifications that would have required government complicity. *Id.*

Rape is alleged here to be a practice of genocide. The Genocide Convention prohibits "causing serious bodily or mental harm to members of the group," at Art. II (b) when committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.* at Art. II. The genocidal rapes alleged here are committed with clear intent to destroy the Muslim and Croatian groups in Bosnia-Herzegovina and, at minimum, to cause serious bodily or mental harm, and are thus actionable under the

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[5/](...continued)
legislation, and in spite of the fact that the ATCA arguably executes and incorporates by reference all relevant infractions of the law of nations or treaties of the U.S., *supra* n. 2. This congressional provision does not preclude the use of ATCA as implementing legislation for civil sanction purposes. Additionally, the genocide prohibition in the Convention is that which customary international law prohibits, hence, that which the ATCA incorporates by reference. Nor can this legislation preclude this Court from applying the international consensus that genocide violates *jus cogens*. "Sitting atop the hierarchy of international law, *jus cogens* norms enjoy the greatest clout, preempting both conflicting treaties and customary international law. [cites omitted]" *Princz*, 26 F.3d at 1180 (Wald, J. dissenting).

ATCA as genocide. The forced impregnation alleged is also genocidal, *see* Anne Goldstein, *Recognizing Forced Impregnation as a War Crime under International Law*, Center for Reproductive Law and Policy 22-24 (1993), at the least in that, by forcing women to bear children of another group, it "impose[s] measures intended to prevent births within the group" on an ethnic basis. Genocide Convention, Art. II (d)

Every act of genocide, prohibited under the Genocide Convention and customary international law even during peacetime, is doubly illegal in a genocidal war, as shown below. Similarly, every act of rape prohibited during war is doubly illegal in a genocidal war, and as such is actionable twice over under the ATCA.

b. Plaintiffs' claims for torts in violation of laws of armed conflict should not have been dismissed.

The laws of war, including humanitarian law, confer rights and obligations on all actors, including states, combatants, and civilians and have long been actionable in U.S. courts against individuals under certain circumstances. *Paquete Habana*, 175 U.S. 677 (1900); *Ex Parte Quirin*, 317 U.S. 1, 27-28 (1942) (dictum); *In re Yamashita*, 327 U.S. 1, 8 (1945); *Terrill* v. *Rankin*, 65 Ky. (2 Bush) 453 (1867). Since the laws and customs of warfare are already part of U.S. domestic law, they do not require implementing legislation by Congress. *See, e.g.*, Paust, *Suing Saddam* at 369; Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4

The Vietnam War and International Law 447 (R. Falk ed. 1976).

Both state and non-state actors can be held individually accountable for committing, assisting, or ordering another to commit war crimes. Every violation of the law of war is a war crime, The U.S. Army Field Manual 27-10, The Law of Land Warfare ¶ 499 (1956) ("Land Warfare"), over which there is universal jurisdiction, Restatement § 404; Land Warfare ¶¶ 498, 500. Any military, paramilitary, governmental, or civilian authority who commits or gives orders to commit war crimes, or is complicitous in them, can also be held individually liable. *Id.* at ¶¶ 501, 509. Jordan Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 166-69 (1972) ("My Lai").

Superiors are accountable for war crimes committed by subordinates if they knew or should have known of them and did not take possible steps to stop them. Land Warfare, at ¶¶ 498, 500-501, 509-510; Paust, *My Lai*, at 175-85. Command responsibility for mass rape and murder are part of U.S. law. *In re Yamashita*, 327 U.S. 1 (1945); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), S/1994/674 (27 May 1994) ("Final Report") ¶¶ 55-62; *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987). A senior U.S. government official in the executive branch has specifically identified defendant Karadzic as "suspected of war crimes and crimes against humanity." Department of State Dispatch, Statement of Secretary Eagleburger at the International Conference on the Former Yugoslavia (Geneva, Switzerland,

Dec. 16, 1992), Dep't of State Dispatch, Vol. 3 No. 52, at p. 5.

Rape during wartime has been prohibited by the law of armed conflict for centuries. Yougindra Khushalani, *Dignity and Honour of Women as Basic and Fundamental Human Rights* 9-71, 133-146 (1982). In the Tokyo trials after World War II, rape was prosecuted against individuals, including commanders, as a war crime by the United States. Charter of the International Military Tribunal for the Far East, 14 Department of State Bulletin 362 (issued 19 Jan. 1946, as amended 26 April 1946) at Art. 5(c) (included under "other inhumane act"). Rape was listed as a crime against humanity in Allied Control Council Law No. 10 (Jan. 31, 1946) which the four occupying powers in Germany adopted as a charter for trying crimes of armed conflict in their own courts in Germany. I *The Law of War, A Documentary History* 980 (Leon Friedman ed., 1972) (Art. II of Law No. 10, I (c)).[6/] These recognitions are directly applicable to the present war, whether it is regarded as international or internal.

[6/] Adding weight to the recognition that rape violates customary international law, including in internal conflicts, is Protocol II of the Geneva Conventions, which the U.S. has signed and both Yugoslavia and Bosnia-Herzegovina ratified, which protects civilian victims of non-international armed conflicts from "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, reprinted in 72 Am. J. Int'l L. 457, 502 (1978).

Prohibitions on unnecessary force against noncombatants during war date back perhaps thousands of years, Bassiouni at 153, were part of the traditional law of nations, and are now largely incorporated into international treaty law, with different provisions applying to inter-state and intra-state armed conflicts.

By characterizing defendant as a non-state actor, the Court below implicitly characterized the war in Bosnia-Herzegovina as an internal one. Even if that were true, which it is not, defendant and his forces would remain subject to humanitarian law governing parties to internal armed conflicts that prohibits the conduct engaged in by defendant. The Geneva Conventions of 1949, especially the Civilian Convention, codified and extended protections for individuals victimized by armed forces in internal as well as international armed conflicts. Common Article 3 of the Geneva Conventions, which covers "armed conflict not of an international character," requires that all "[p]ersons taking no active part in the hostilities...be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex...or any other similar criteria." It prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;...outrages upon personal dignity, in particular, humiliating and degrading treatment" and extrajudicial killing. Plaintiffs have alleged that they have been treated inhumanely by precisely such wartime acts, including by being adversely distinguished for rape and murder based on sex and ethnicity. The complaint in *Linder*, which included allegations that the Geneva Conventions were violated in an internal war, was upheld by the Eleventh Circuit, which flatly recognized that "there is no foreign civil war exception

to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war." *Linder* v. *Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992).

Thus, even if this Court determines that Karadzic's regime is not subject to the same obligations as a High Contracting Party, his actions are nevertheless unambiguously governed by Common Article 3, which applies whether or not conduct can be attributed to a state or state official. *See* Paust, *Applicability*, at 506 n.27. Acts of torture during war, which may violate the Torture Convention at any time, violate Common Article 3 when committed during an internal war. Rape is alleged here to be, *inter alia*, a form of torture. *See* Deborah Blatt, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. Rev. L. and Social Change 821 (1992). Violations of Common Article 3, as violations of the Geneva Conventions, are entirely sufficient for civil jurisdiction under the ATCA.

However, despite the lower court's implicit finding to the contrary, plaintiffs have alleged, and the international community has found, that the armed conflict in former Yugoslavia is an international, not an internal, one. The Security Council of the United Nations has responded to the atrocities against persons like plaintiffs with the creation of a tribunal with jurisdiction to try war crimes and crimes against humanity, including genocide, committed on the territory of the former Yugoslavia since January 1, 1991. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, U.N. Doc. S/25704, art. 1, at 36 (1993). The Security Council has expressly determined that "all parties to the conflict are bound to comply with their obligations under international

humanitarian law and in particular the Geneva Conventions...and that persons who commit or order the Commission of grave breaches of the Conventions are individually responsible in respect of such breaches." Sec. Council Res. 771 (1992). That Republika Srpska is not recognized as a state has proved no barrier.

Plaintiffs have alleged personal violation by the same series of acts over which the U.N. tribunal, terming these acts "war crimes" and "crimes against humanity," has asserted its jurisdiction, based on the international law invoked by plaintiffs.[7/] Even if defendant is no more than the head of an unofficial group, as Judge Leisure would have it, his actions remain governed by the Civilian Convention as a whole. He can be held liable for numerous war crimes, including willful killing, torture and unlawful deportation and confinement, each of which constitutes a "grave breach" under article 147, see Paust, *Applicability*, at 511-12, giving rise to universal jurisdiction. Given that the international tribunal established by the United Nations, with official U.S. support, will be holding defendant's forces to the standards applicable to states in an international armed conflict, it would lack comity and be incongruous in the extreme for a

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[7/] The International Court of Justice has also asserted its subject matter jurisdiction in a case brought by the government of Bosnia-Herzegovina against rump Yugoslavia over the genocide allegedly involved in this war. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order, 8 April 1993, ¶¶ s 26, 35 ("ICJ Order").

U.S. federal court to hold that the leader of such entity was merely engaged in raising a private ruckus.

Finally, Common Article 1 of the Geneva Conventions requires the parties "undertake to respect and to ensure respect for the present Convention *in all circumstances.*" Dismissing this lawsuit disrespects the terms of this treaty, which binds this Court to allow this action to proceed.

c. Plaintiffs' claims for torture are actionable under the ATCA.

Even were ATCA to require all torture complained of under it to be "official" rather than "private," plaintiffs have alleged, and defendant has affirmed, that Karadzic is not merely a private actor. Some (not all) international prohibitions on torture bind public perpetrators, *see, e.g.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 2, (limited to acts committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"), as does the TVPA.

The District Court misapplied this law to the facts of this case. As shown in detail at § IC below, it is undisputed that defendant Karadzic is more than a private actor. He claims to lead a government. Def. Stmt. ¶ 1, JA 51. Plaintiffs pleaded that, in perpetrating abuses upon them, he acted for his insurgent entity, Cmplt. ¶¶ 13-14, JA 10-11 and at the instigation and with the consent of rump

Yugoslavia. Cmplt. ¶¶ 2, 27, JA 6, 15. In alleging that defendant acted for his own and the Belgrade regime, plaintiffs thus complained neither of private torture nor of torture by a private actor. They complained of a publically-sanctioned campaign of torture by one acting both for a self-proclaimed state-like entity and a legally recognized one. On the same factual basis that defendant's acts of torture can be reached under the TVPA, they are easily actionable under ATCA.

C. The District Court Erred in Dismissing This Action Under the Torture Victim Protection Act.

The TVPA provides a civil cause of action against any individual "who, under actual or apparent authority, or color of law, of any foreign nation," subjects an individual to torture or extrajudicial killing. TVPA § 2(a). The district court held it lacked subject matter jurisdiction because TVPA applied only to torture by officials of recognized states, which defendant was not. But recognition is not required for torture and murder to be actionable under TVPA. Karadzic is amply covered under TVPA because he acts with actual or apparent authority of Republika Srpska, a state-in-fact under this Court's standards. Moreover, even if U.S. recognition were required, defendant acts under color of law of the regime in Belgrade, Yugoslavia, a state recognized by the United States.

Initially, defendant drew power and legitimacy from his role as an elected legislator of Bosnia-Herzegovina, a recognized government, and as head of an official party. He is now titular head of a self-proclaimed insurgent "republic"

which controls significant territory and population, an army, a government, and engages in international negotiations. He acts for and with the connivance and substantial support of Yugoslavia, a recognized state. These factors give unmistakable authority, actual or apparent, and the color of law to the brute force he wields. They easily satisfy the legislative requirement of "some governmental involvement," Op. at 17, JA 210 (quoting House Report), for torture to be actionable under the TVPA.

1. Foreign nations need not be recognized for their leaders to be sued under the TVPA.

To be actionable under TVPA, the district court found, acts of torture must be carried out "under the authority or color of law of an entity recognized by the United States as a foreign nation." Op. at 16-17, JA 209-10. The district court erred in relying on lack of official recognition of Republika Srpska as the basis for concluding that its leader is exempt from liability for a campaign of torture and murder.

There is no authority whatever for the district court's view that a foreign nation must be recognized by the United States for an action against its leader to lie under the TVPA. As the district court noted, the TVPA refers to "any foreign *nation*." Op. at 17, JA 210. By expressly not using the term "state," the TVPA signals a definition of official separate from recognition and broader in compass from "state." The language of the TVPA leaves no indication that Congress intended to allow poor diplomatic relations with our government—which may be partly due to systematic

violations of human rights—to shield perpetrators from civil liability for violating international law.

Moreover, official recognition declares, it does not constitute, state status. J.L. Brierly, *The Law of Nations* 131-132 (5th ed. 1955). Not wishing to reward aggression, but wishing to uphold the law, governments sometimes recognize that an entity can be, in fact, a state without being officially recognized as such. In *Nat'l Petrochemical Co. of Iran* v. *M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988), this Court allowed a wholly-owned corporation of the Khomeini government of Iran to sue as a "state" for purposes of diversity jurisdiction, rejecting defendants' argument that the lower court correctly dismissed Iran's complaint because it was not formally recognized by the United States. Similarly, in rejecting the Palestinian Liberation Organization's ("PLO") argument that since the United States government had not extended it formal diplomatic recognition, the PLO could not be sued in our courts, this Court stated flatly, "there is no bar to suit where an unrecognized regime is brought into court as a defendant." *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991).[8/] Concurring in *Tel-Oren*, Judge Edwards similarly conceded the possibility that "a state not recognized by the United States is a state as defined by international law and therefore

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[8/] Judge Leisure was mistaken in citing *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) as to whether the Nicaraguan Contras constitute a recognized state. Op. at 15, JA 208. The Sanchez-Espinoza court never considered whether the Contras constituted a state or whether they were recognized as such.

bound by international responsibilities." 726 F.2d at 791, n.21.[9/] The clear implication is that while recognition alone confers legitimacy, an entirely illegitimate entity can nonetheless be a state-in-fact for purposes of invoking certain international responsibilities.

2. Defendant Karadzic acted with actual or apparent authority of a foreign nation.

The district court found that Karadzic "does not act with the authority of any foreign nation." Op. at 18, JA 211. Plaintiffs alleged that "defendant Karadzic acted under color of law, with apparent or actual authority as President of the self-proclaimed Republic of Serbia and high commander of the Serbian Army there, and in collaboration with the official Serbian regime in Belgrade, Yugoslavia." Cmplt. ¶ 27, JA 15. The Complaint described his "official capacities" as leader of the self-proclaimed Republic of Serbia, Cmplt. ¶¶ 13, 14, 16, 29, JA 11, 15 and alleged that he implemented his entire program for violation of human rights "in concert with the Serbian regime in Belgrade, Yugoslavia." Cmplt. ¶ 2, JA 6.

Karadzic was previously an elected member of Parliament of Bosnia-Herzegovina, Cmplt. ¶ 15, JA 11, and used this official position to consolidate his control over military forces subsequently used. He was head of the Serbian Democratic Party, an official party of Bosnia-Herzegovina,

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[9/] The statute confronted in *Nat'l Petrochemical,* unlike the ATCA or TVPA, requires that the subject foreign nation be recognized by the U.S. government.

which became the springboard for his onslaught. Cmplt. ¶¶ 9, 15, JA 9, 11. He now asserts "I am President of the Republic of Srpska." Def. Stmt. ¶ 1, JA 51. He is, without dispute, the military and titular leader of this entity, Cmplt. ¶ 13, JA 11, from which post he presides over a body acting as a legislature, controls significant population and territory, is the leader of a population, maintains and directs a military, and negotiates internationally. Def. Stmt. ¶¶ 4, 10, JA 51; Cmplt. ¶ 7, JA 8. He acts like states act. Karadzic's entity has enough of an international legal personality to give actual or apparent authority to his naked exercise of power.

"Srpska," while unrecognized and illegitimate, qualifies as a "state" by this Court's empirical standards. The district court notes, Op. at 15, n.12, JA 11, that the Second Circuit has described a "state" as "entities that have a defined and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other such entities," citing *Klinghoffer*, 937 F. 2d at 47. The district court then concluded, without citing evidence, that "[t]he current Bosnia-Serb [sic] entity fails to meet this definition." Op. at 15 n.12, JA 11. This conclusion is contrary to the undisputed facts of record. Further, Judge Leisure misquoted the *National Petrochemical* test in *Klinghoffer*, leaving out the factor of "control over territory" found so significant by the *Klinghoffer* court. *Klinghoffer*, 937 F.2d at 48. Territorial control is one of the most significant distinctions between the PLO when *Klinghoffer* was decided and the Bosnian Serbs today. The PLO at that time had never assumed control over the territories to which it lay claim. *Klinghoffer*, 937 F.2d at 47-48. Karadzic's forces control significant territory in Bosnia-Herzegovina, Cmplt. ¶ 13,

JA 10, a fact separately acknowledged by Judge Leisure. Op. at 3, JA 196. ("Serbs living within Bosnia-Herzegovina boycotted the referendum...claiming a part of its territory for their own.") Those within this territory are, as the Complaint evinces, subject to control by defendant's forces. As to capacity for formal relations, defendant has participated in on-going so-called peace negotiations under international auspices. Aff. of Ramsey Clark ¶ 3, JA 58. Defendant's government seems to be thought by the international community to have what the PLO, at the time of *Klinghoffer*, lacked: "the ability actually to implement the obligations that normally accompany formal participation in the international community." *Klinghoffer*, 937 F.2d at 48.

When Defendant Karadzic acts in his official capacity, the role in which he is sued in this litigation, he is acting for and on behalf of "Srpska." While by no means legitimate, it has the characteristics of entities whose power is deemed sufficiently organized to invoke certain international responsibilities. The parties disagree on the legitimacy of Karadzic's authority, but not on its existence.

Equally important, and totally ignored by the district court, defendant has, in the language of the U.S. Supreme Court in *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), "acted together with" the rump-Yugoslav state and has "obtained significant aid from [its] state officials." Cmplt. ¶¶ 2, 27. The "weight of the State," *id.*, of

Yugoslavia is behind him in committing the atrocities of which plaintiffs complain.[10/]

[10/] *See, e.g.*, Exec. Order No. 12[, 8]08, 3 C.F.R. 305 (1993) (quoting a statement by then-U.S. President George Bush that "actions and policies of the Governments of Serbia and Montenegro, acting under the name of the...Federal Republic of Yugoslavia, in their involvement in and support for...force and violence utilizing, in part, the forces of the so-called Yugoslav National Army" are present in the Bosnian conflict); Notice of Continuation of Emergency with Respect to the Federal Republic of Yugoslavia, 58 Fed. Reg. 30693 (May 25, 1993) (President Clinton continuing national emergency "[b]ecause the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) has continued its actions and policies in support of groups seizing and attempting to seize territory in Croatia and Bosnia-Hercegovina by force and violence"); Report of the Commission on Human Rights, 2nd Special Sess., at 3, U.N. Doc. E/CN.4/1992/S-2/6 (1992) ("recognizing that Serbian leadership in territories under their control in Bosnia and Hercegovina, the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for [the] reprehensible practice [of ethnic cleansing]"); (and condemning ethnic cleansing being carried out in Bosnia-Herzegovina, recognizing that, among others, the "Yugoslav Army" bears "primary responsibility."); U.N.G.A. Res. 47/121, U.N. GADR, 47th Sess., at 67, U.N. Doc. GA 18470 (1992) (pointing out the failure to stop either direct or indirect support to Bosnian Serbs by JNA's aggressive acts); S.C. Res. 787, U.N. SCOR, 3137th mtg., (continued...)

A recent proclamation by the President of the United States lends executive weight to the conclusion that defendant Karadzic is, precisely, an "authority." The Executive Order prohibits as "detrimental to the interests of the United States" entry of "aliens [who] are members of the *authorities*, including legislative authorities, in those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces...and those acting on behalf of such *authorities* or forces." Proclamation No. 6749, 59 Fed. Reg. 54,117 (1994) (emphasis added). Defendant is the highest

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[10/](...continued)
at 3, U.N. Doc. S/RES/787 (1992) (requiring the immediate cessation and withdrawal of all forms of outside interference including actions taken by units of Yugoslav People's Army (JNA)). Both the Republic of Serbia and the Government of Yugoslavia have issued statements affirming this. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*), 1993 I.C.J. 325, at ¶¶ 58-61 (Sept 13) (separate opinion of Judge Lauterpacht) (quoting communiques demonstrating governmental "assistance to the Serbs in Bosnia in breach of the Security Council embargo;" specifically, the communique of the Republic of Serbia stated that Yugoslavia "has been unreservedly and generously helping" in a "just battle;" the communique of the Republic of Yugoslavia noted that it was being "forced to adjust all future aid...to reduce it exclusively to essential contingents of food and medicaments."). Based on such allegations, the ICJ ordered provisional measures against Yugoslavia for genocide, ICJ Order at 24.

such "authority." There is no one to whom the term more clearly applies.

3. Defendant Karadzic acted under color of law.

Even if "Srpska" is not deemed to confer sufficient authority on defendant's acts, he is demonstrably acting under the color of law of Yugoslavia, a recognized state.

In specifying that acts actionable under TVPA occur within an authoritative ambit, Congress covered torture and murder committed "under color of law." TVPA § 2. In the U.S. civil rights tradition, this phrase refers to violations by individuals that occur under a mantle of legal entitlement, under cover of a claim or show of public right, or with the backing of public help. *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879). "Under color of law" means not that behavior is legal, rather that it pretends to be, taking on legal "color" while remaining *ultra vires*. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 287-88 (1912); *Monroe* v. *Pape*, 365 U.S. 167, 172-80 (1960). The doctrine exists because organized illegality acquires special force and reprehensibility when purporting to express, or when drawing on the resources of, constituted authority. Defendant Karadzic has engaged in just such brazen usurpation. As leader of an insurgent republic, and an actor for a recognized government, his activities possess all the elements that give clout to power, such that he should be held to the standards to which states are held.

For partial guidance in interpreting "under color of law," the legislative history of the TVPA directs courts to 42 U.S.C. § 1983, H.R. Rep. No. 367, 102d Cong., 1st Sess. 5

(1991), reprinted in 1992 U.S.C.A.N. 84, 85-86; S. Rep. No. 249, 102nd Cong. 1st Sess. 8 (1991), in order "to give the fullest possible coverage." S. Rep. No. 249, 102nd Cong., 1st Sess. at 8 (1991). For purposes of § 1983, "color of law" is synonymous with Fourteenth Amendment "state action." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 838 (1982); *Merola* v. *National Railroad Passenger Corporation*, 683 F. Supp. 935, 940 (S.D.N.Y. 1988). In *Lugar*, the Supreme Court held that state action requires that:

> first the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible...[and, second] the party charged with the deprivation must be a person who may fairly be said to be a state actor...because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937.

The two prongs of this test converge when allegations are directed against "a party whose official character is such as to lend the weight of the State to his decisions." *Id.*

The significant aid, collaboration, and symbiotic relationship between Karadzic and the regime in Belgrade in his campaign makes him an arm of that state for this purpose. Even purely private actors can be deemed to have acted "under color of law" where there is "significant" state involvement in their actions. *See Lugar*, 457 U.S. at 937.

State involvement is a factual inquiry. *Howerton* v. *Gabica*, 708 F.2d 380, 383 (9th Cir. 1983). *See Lugar*, 457 U.S. at 939. The Complaint alleged ample facts showing that defendant's relationship with rump Yugoslavia constitutes state involvement by this standard.

Private actors engaged jointly with state officials in prohibited action, act under color of law. *United States* v. *Price*, 383 U.S. 787, 794 (1966); *Spear* v. *Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992). To survive a motion to dismiss for failure to state a claim it is enough that a conspiracy or meeting of the minds with state actors is sufficiently alleged. *See Dahllberg* v. *Becker*, 748 F.2d 85, 91 (2d Cir. 1984); *Howerton*, 708 F.2d at 382; *Spear*, 954 F.2d at 68. Private parties who conspire with state officials to violate the constitutional rights of others may be sued under § 1983. *Conway* v. *Village of Mount Kisco*, 750 F.2d 205, 214 n.12 (2d Cir. 1984) reaff'd, 758 F.2d 46 (2d Cir. 1985), cert. dismissed, 479 U.S. 84 (1986).

In a situation strikingly parallel to the ethnic atrocities in the case at bar, the United States Supreme Court has held that, where sheriffs drove three Black men to a remote area and released them into the custody of 15 private parties alleged to have tortured and killed them, an action against the private parties would lie under 42 U.S.C. § 242, the criminal counterpart to § 1983. *Price*, 383 U.S. at 787-807. The "brutal joint venture" was made possible by the detention and calculated release of the prisoners by a state officer, such that "[t]hose who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation." *Price*, 383 U.S. at 795.

The involvement of the Belgrade regime in Karadzic's foul activities has been overt and well documented. Richard Boucher, U.S. State Department Briefing, Sept. 10, 1992 (Belgrade authorities continue "to supply arms, ammunition, fuel, spare parts, and a variety of other things to Bosnian Serbs."); *supra* n.10. The official red star of the Yugoslav People's Army (JNA) is highly visible on much of the military machinery and uniforms used by Karadzic and forces under his command. Cmplt. ¶ 15, JA 11. His tools of aggression are supplied from rump Yugoslavia. Cmplt. ¶ 18, JA 12 (Serb Republic soldiers wore uniforms and used truck of Yugoslav People's Army in torture and murder of named plaintiffs);

Plaintiffs clearly alleged, Cmplt. ¶ 2, JA 6, that defendant acts with and for Yugoslavia. Karadzic is "in collaboration with" Belgrade. Cmplt. ¶ 27, JA 15. He travels under a Belgrade passport, Attachment to Def. Stmt., JA 55, which was recently issued. Addendum to Def. Stmt. Their overall connection displays a "symbiotic relationship" between a state and another party,[11/] as well as significant

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[11/] Under this test, the acts of a private party are attributable to a state if a government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). *See also Rendell-Baker* 457 U.S. at 843. In *Burton*, racial discrimination practiced by a restaurant located in a public parking garage was held to constitute state action, *Id.* at 725, 862, because, in electing to "place (continued...)

state encouragement.[12] The goal of defendant's "ethnic cleansing" campaign is to create a "Greater Serbia," uniting his regime with theirs. All this lends the color of Yugoslav law to defendant's acts.[13] *See also Velasquez-Rodriguez* v.

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[11](...continued)
its power, property and prestige" behind the discrimination, the state insinuated itself into a position of interdependence with the restaurant. *Burton*, 365 U.S. at 725. The relationship between Karadzic's campaign of torture and murder and the Milosevic regime in Belgrade is demonstrably far more intentional, intimate and mutually beneficial than this.

[12] Under *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, (1970), a private party's actions are chargeable to the state when "the state, by its law, has compelled the act." *Id.* at 170. This can occur not only by state coercion, which does not exist here, but when the state has provided "significant encouragement, either overt or covert," for the actions of the party. *Albert* v. *Carovano*, 824 F.2d 1333, 1340 (2d Cir. 1987) (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004). War-making might also be argued to be a "public function" that Serbia has delegated to Karadzic to perform in Bosnia-Herzegovina. *See Howerton* 708 F.2d at 382.

[13] *Tel-Oren* is not to the contrary. None of the judges there considered that Libya's alleged participation in supporting PLO terrorism might supply the "state action" element ostensibly missing from the claim against the PLO. Judge Edwards considered only in passing "jurisdiction *over*
(continued...)

Honduras, 28 I.L.M. 291 (Inter-American Court of Human Rights, 1989) (imputing to Honduras "disappearances" by unofficial "death squads" which government supported and acquiesced in; esp. ¶ 172). If the State of New York supported someone to torture and exterminate ethnic African Americans in a nearby state the way Yugoslavia supports Karadzic in the torture and murder of ethnic Muslims and Croats, this Court would have no trouble recognizing state action. Defendant's status as surrogate for Yugoslavia easily satisfies the House Report standard of "some governmental involvement."[14/]

[13/](...continued)
Libya," which he found barred by FSIA, rather than acts by terrorists working *for* Libya. *Tel-Oren*, 726 F.2d at 775-776 n.2. *Tel-Oren* thus left no suggestion for Karadzic to exploit that recognized states may avoid accountability under international law by delegating the commission of human rights abuses to ostensibly non-state actors, committing torture by proxy.

[14/] It is, however, insufficient to confer any "immunity." Defendant Karadzic is not a diplomat, "sovereign," nor "head of state." The district court saw clearly that recognition is for the Executive Branch, *citing Lafontant* v. *Aristide*, 844 F. Supp. 128, 130 (E.D.N.Y. 1994) ("No judicial hearing or factual determination aside from receipt of the State Department's communication is warranted."). The court below also knew that the Executive Branch had declined to extend defendant immunity on any basis, Op., at 7 n.6, JA 200; see Plaintiff's Brief Exh. C, JA 108. Given
(continued...)

4. The district court erred in placing the burden on plaintiffs to establish exhaustion of local remedies.

The district court found the record insufficient to decide whether plaintiffs had exhausted local remedies, or whether to do so would be futile, as the TVPA requires. Op. at 19 n.14. This ruling ignores the legislative history of the TVPA, which places the burden of this showing on defendant, as well as the cruel realities in Bosnia-Herzegovina unambiguously alleged by plaintiffs. It was also woefully premature, in that plaintiffs were not given an opportunity to provide evidence on this question.

Congress instructed courts to approach cases under the TVPA on the assumption that initiating such litigation "will be virtually prima facie evidence that the claimant has

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[14/](...continued)
that the State Department had *refused* to issue the kind of communication that provided the basis for the *Aristide* result, 844 F. Supp. at 139, the district court should not have speculated that the State Department might some day change its mind. This is the opposite of deference to the executive. Just as the U.S. government "evinced a willingness" to permit unrecognized Iran to litigate in *National Petrochemical*, 860 F.2d, at 555, the Executive branch evinced a willingness to allow plaintiffs to litigate against Karadzic by squarely granting him "no immunity from the jurisdiction of the courts of the United States." Exh. C., JA 108. . Moreover, there is no immunity from the crimes plaintiffs allege. Paust Brief § V.

exhausted his or her remedies in the jurisdiction in which the torture occurred." S. Rep. No. 249, 102d Cong., 2d Sess. at 9-10 (1991). The Senate Report instructs, consistent with principles of international law and common law applied by U.S. courts, "[t]he ultimate burden of proof and persuasion on the issue of exhaustion of remedies...lies with the defendant." Senate Report 249 at 10. *See also Velasquez Rodriguez*, 28 I.L.M. 291, at ¶ 73 (1989) (same). Plaintiffs alleged that "a proceeding to adjudicate these claims can not practically be filed in Bosnia-Herzegovina, which is in a state of war and partial occupation [and that a] suit against defendant Karadzic would be futile and result in serious reprisals." Cmplt. ¶ 31, JA 16. There is ample evidence that pursuit of local remedies against defendant would be impossible and dangerous.

D. The District Court Erred in Denying Plaintiffs Their Implied Rights of Action Under 28 U.S.C. § 1331.

This Court has subject matter jurisdiction over all claims in this case under 28 U.S.C. § 1331, which provides federal district courts with jurisdiction over all actions "arising under the Constitution, laws, or treaties of the United States." Plaintiffs have stated claims under laws and treaties of the United States and other international agreements to which the U.S. government is a party. They have also stated claims under customary international law, which is part of federal law, and gives rise to universal jurisdiction. Those pertaining to the laws and customs of warfare, supra at § IB2(b), are either self-executing, have been implemented, or are customary, and are either directly incorporable or incorporated through various statutes,

including § 1331. *See*, *e.g.*, Restatement § 111 and comms. c-f and Rptr. n.4; Paust Brief at § II. The provisions against torture and extrajudicial killing appear in or are incorporated through federal statutes. Plaintiffs implied rights of action were thus improperly dismissed.

II. JURISDICTION OVER THE PERSON OF DEFENDANT KARADZIC WAS PROPERLY OBTAINED.

It is unclear whether the district court's decision to rule on subject matter jurisdiction represents an acknowledgment that personal jurisdiction over defendant is otherwise proper. It is certain, however, that jurisdiction over the person of defendant was correct, based on valid service of process and subject matter jurisdiction, *Filartiga*, 630 F.2d at 878, consistent with constitutional standards.

Service of process was complete. Def. Stmt. ¶ 9, JA 52; Op. at 6, JA 199. Defendant was served personally in New York City away from the United Nations in the manner authorized by the district court. Diebler Decl. ¶ 18, JA 172-73. This alone is sufficient to establish personal jurisdiction over defendants under New York C.P.L.R. § 301. *See Opert* v. *Schmid*, 535 F. Supp. 591, 593 (S.D.N.Y. 1982) ("It is 'black letter law that personal service within its geographical area establishes a court's personal jurisdiction over the defendant.") (*quoting Aluminal Industries, Inc.* v. *Newtown Comm'l Assoc.*, 89 F.R.D. 326, 329 (S.D.N.Y. 1980)); *see also* 1 Weinstein, Korn & Miller, New York Civil Practice §§ 301.10-301.12.

In addition, plaintiffs bring this action, in part, under the Alien Tort Claims Act, under which, "[a]lthough seldom employed... means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction." *Amerada Hess*, 830 F.2d 421 at 425. Since, as demonstrated above, plaintiffs properly stated an ATCA claim, the ATCA requires only "constitutionally satisfactory personal jurisdiction over the defendant." *Id.* at 428 (*citing Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)). Service in this action was made personally on Karadzic pursuant to a valid order of Judge Richard Owen. Op. at 6, JA 199.

This exercise of personal jurisdiction satisfies the due process requirement. First, as this Court has noted in dicta, "certain universal offenses, like piracy and genocide, are offenses against the law of nations wherever they occur...Since, under international law, a state may punish these offenses even when they occur outside its territory, it has been argued that such occurrences always have sufficient 'effects' within the United States to satisfy due process." *Amerada Hess*, 830 F.2d at 428. Indeed, the violations in *Amerada Hess*, involving a wartime attack on a private oil tanker by the Argentine Republic, pale by comparison with those alleged in this case. Here, Karadzic initiated a campaign of torture and genocide through war against entire ethnic populations, proclaiming himself head of a government of Serbs under his authority. He is therefore *hostis humani generis*—an enemy of all humanity—and may fairly anticipate being hailed into the courts of any nation. *See* Restatement (Third) of the Foreign Relations Law of the

United States § 404 (1986) and comm. a ("no links" required) (3d ed. 1987); *United States* v. *Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (state may prescribe and prosecute certain offenses such as genocide and war crimes "even absent any special connection between the state and the offense"); *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985) cert. denied, 475 U.S. 1016 (1986) ("there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation"); *In re Estate of Marcos Litigation*, 978 F.2d 493, 499-500 (9th Cir. 1992) ("no nexus to this country" required).

Second, Karadzic was served with process within New York State. The Supreme Court in *Burnham* v. *Superior Court*, 495 U.S. 604, 610 (1990), upheld the constitutionality of exercising personal jurisdiction over nonresidents who are physically present in the State at the time process is served, calling it "[a]mong the most firmly established principles of personal jurisdiction in the American tradition." *Id.*

The constitutional basis for exercising personal jurisdiction over Karadzic is not weakened by the fact that one of his activities in New York was participation in United Nations-sponsored peace talks. While U.N.-related activities cannot be considered "doing business" in New York, *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991), and were not so argued below, those activities can go to satisfying the requirements of due process. In *United States* v. *Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988), the court found that assertion of personal jurisdiction over the PLO met constitutional standards of due process even though the court based

jurisdiction on the PLO's U.N.-related activities. *Id.* at 1461.

Moreover, it is unquestionable that activities in the State other than U.N. activities provide an appropriate basis for exercise of personal jurisdiction. In *Klinghoffer*, the court on remand was directed to determine whether the PLO engaged in fundraising and proselytizing, which would provide a basis for personal jurisdiction. 937 F.2d at 52. Karadzic, through counsel, admits that he used his visit to New York to raise money. Schilling Aff. ¶ 5-8, JA 178. Karadzic took full advantage of New York and national American news media to proselytize during his stay in New York. Plaintiffs' Brief Exh. H., JA 141. Any possibility to claim that Karadzic was "not in New York" because he was engaged in U.N.-sponsored activities evaporated when he availed himself of the benefits of the forum. *See Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 69 (1992); *A.I. Trade Finance* v. *Petra Bank*, 989 F.2d 76, 82 (2d Cir. 1993).

Filartiga recognized that claims concerning violations of international law can be "transitory," *Filartiga*, 630 F.2d, at 885. In enacting the TVPA, Congress recognized universal jurisdiction over civil actions against torturers, expressly noting that "current travel" by an individual to the U.S. would, by itself, provide sufficient contacts for personal jurisdiction. *See* S. Rep. No. 249, 102d Cong., 2d Sess. at 7 (1991) (to accompany S.313, as amended). Accordingly, jurisdiction over defendant is proper.

III. PLAINTIFFS-APPELLANTS' CLAIMS ARE JUSTICIABLE AND SHOULD BE ADJUDICATED.

The district court offered "initial considerations" going to justiciability that "militate[] against" exercising jurisdiction. Op. at 6, JA 199. It stated that this action seeks what could become "an advisory opinion" should the State Department recognize a Bosnian Serb state with Karadzic as head. Op. at 7, JA 200. Courts adjudicate facts as they are, not as they might be. That imaginable facts in a speculative future might alter a judicial result does not render an opinion based on those facts "advisory" nor make them incapable of judicial resolution.

The Justice Department has argued against the suggestion that claims brought under the ATCA are non-justiciable. As *amicus* in *Filartiga*, the United States argued that not every case that affects foreign policy is injusticiable, and that human rights claims are directly enforceable in domestic courts. Memorandum for the United States in *Filartiga* v. *Pena-Irala*, 19 Int'l Leg. Mat. 585, 602-04; *see also Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (citing § 1350 as an example of congressional intent to allow claims implicating foreign affairs to be adjudicated in federal courts).[15/] As the

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[15/] *See Linder* v. *Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (suits against Nicaraguan opposition parties non-justiciable but tort suits against individual party members not barred because suits against individuals, while "politically (continued...)

Eleventh Circuit found, reversing in *Linder*, there is nothing injusticiable about tort injuries sustained by civilian plaintiffs in war—whether political, foreign, or civil. *Linder*, 963 F.2d at 336-337. *See also Paul* v. *Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

That torts are committed in violation of international law does not make them less justiciable. Lea Brilmayer, *International Law in U.S. Courts: Modest Proposal*, 100 Yale L.J. 2277, 2280 (1991) ("International cases are not necessarily more 'political' or less 'legal' than domestic ones..."); Paust, *On Human Rights*, Mich. J. Int'l 543, 625-28, 646 & n.595-596. Judge Kaufman has recognized that "[t]he obligation of our courts to identify egregious violations of international law is in many ways analagous to the courts' traditional role in redressing deprivations of civil liberties that occur at home," Judge Irving R. Kaufman, *A Legal Remedy for International Torture*, N.Y. Times Magazine, Nov. 9, 1980, § 6 (Magzine), at 44, 52 ("Kaufman"), deprivations that courts routinely adjudicate.

[15/](...continued)
charged," did not challenge U.S. foreign policy) (*quoting Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (despite "politically charged context," plaintiffs claims presenting common law tort not barred as political question)); *see also Tel-Oren*, 726 F.2d at 796 (political question doctrine should not be used to vitiate subject matter jurisdiction when it otherwise exists under § 1350) (Edwards, J.).

Now that defendant is prohibited from entering the United States, this Court alone may have both the personal jurisdiction over him and the ability to provide a fair hearing on plaintiffs' claims. The legitimate government of Bosnia-Herzegovina does not now control the majority of its territory; those who do, the perpetrators of the atrocities, cannot be expected to provide relief against their leader. The Statute adopted by the international tribunal does not allow for civil remedies, Statute of the International Tribunal, in Security Council Resolution 827 of May 25, 1993 (incorporating The Report of the Secretary General pursuant to Security Council Resolution 808 of February 22, 1993), and forbids trials in absentia, Statute at art. 21. Sexual atrocities may or may not be prosecuted.

A generalized reluctance to adjudicate a case like this one evidences the bystander mentality that permitted the genocide under the Third Reich to go unchecked. The law against genocide invoked by plaintiffs was promulgated to insure that nothing like that ever happened again. Yet "[o]nce again there is genocide occurring in Europe." Jordan J. Paust, *Applicability*, 9 Am. U.J. Int'l L. & Pol'y at 522. Would we turn away Hitler's victims if he was served in New York? Judge Kaufman has affirmed that, "the enforcement of fundamental norms by federal courts is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world." Kaufman, *supra* at 52. This case calls for delivery on that commitment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment dismissing plaintiffs-appellants claims, deny defendant's motions to dismiss, and remand for further proceedings.

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Respectfully submitted,

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